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IN THE SUPREME COURT OF THE UNITED STATES

JORGE REYEROS and JUAN REYEROS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari
To the United States Court of Appeals
for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where the prosecution of a federal case arises out of a cooperative, but not formally joint, law enforcement effort between the United States and a foreign government, does the due process doctrine articulated by this Court in such cases as Brady v. Maryland, 373 U.S. 83 (1963), Giglio v. United States, 405 U.S. 150 (1972), and Kyles v. Whitley, 514 U.S. 419 (1995), require U.S. prosecutors to obtain and disclose evidence favorable to the defense which is located in the files of the cooperating foreign authorities?

2. Should a federal appellate court sua sponte refuse, in its consideration of a Brady argument raised on direct appeal, to take cognizance of substantial exculpatory evidence discovered by the defense after trial and sentencing, where the United States has never objected to discussion of this material in appellant's brief or its inclusion in the appellate appendix, and the material is of unquestioned authenticity?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (Juan Reyeros, Jorge Reyeros, and the United States). Co-defendants were named in the indictment, but none stood trial or appealed, and they are not parties to this or any related petition.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JORGE REYEROS and JUAN REYEROS respectfully petition this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit filed and entered on July 31, 2008.

OPINIONS BELOW

The Third Circuit's precedential Opinion (per Jordan, J., with Sloviter & Alarcón [9th Cir.], JJ.) was filed on July 31, 2008; see United States v. Reyeros, 537 F.3d 270; Appx. A. The United States District Court for the District of New Jersey (Bassler, J.) wrote but did not publish an opinion denying post-trial motions. A copy is Appx. B.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit affirming the applicants' convictions and sentences was filed and entered on July 31, 2008. A copy is attached as Appendix A. A timely joint petition for rehearing was denied on October 10, 2008. Appx. C. On December 31, 2008, under No. 08A574, Justice Souter extended the time for filing this petition to and including March 9, 2009. This petition is timely filed on or before that date. Rules 13.1, 13.3, 30.1; 28 U.S.C.

§ 2101(c). Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND FEDERAL RULE INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in pertinent part: "... nor shall any person ... be deprived of life, liberty, or property, without due process of law; ...."

Rule 201 ("Judicial Notice of Adjudicative Facts") of the Federal Rules of Evidence provides, in pertinent part: "**(f) Time of Taking Notice.** Judicial notice may be taken at any stage of the proceeding." Evidence Rule 1101(a) ("Applicability of Rules") provides, in part, "**(a) Courts and judges.** These rules apply to ... the United States courts of appeals ...."

STATEMENT OF THE CASE

This petition presents important questions concerning the application of the Brady doctrine in the context of the ever-expanding world of transnational criminal investigations and prosecutions. The Third Circuit upheld the petitioners' convictions, after a joint jury trial, for conspiring to import cocaine and unauthorized access to Customs Service computers.

a. Procedural History

After a two-month jury trial held in the District of New Jersey in late 2004, applicant Jorge Reyeros was convicted on two of six charges in a superseding

indictment. Applicant Juan Reyeros, his brother, was also convicted on two counts. The district court imposed sentences of more than twenty years' imprisonment. The defense was able to find one piece of favorable material in Colombian court files impeaching the credibility of a key witness against them, a July 2004 letter from cooperating witness Hernan Uribe to the extradition magistrate. But only after trial was an even more favorable document discovered, a May 2004 letter from Uribe, in the official Colombian court file.

b. Statement of Facts

Extensive investigation led to little in the way of physical or electronic evidence. The facts as related at trial are set forth in detail in the Third Circuit's opinion, Appx. A, and may be summarized as follows:

> [Hernan] Uribe testified that ... Juan asked him for help identifying an American company through which 400 to 500 kilograms of cocaine could be imported into the United States. Uribe stated that Juan told him that Jorge was a Customs inspector and could use that position to ensure containers containing drugs could enter the United States without being inspected.
>
> Uribe described how he sought the help of Garravito-Garcia .... Garravito-Garcia introduced Uribe to [James] Lagrotteria in Colombia in March 1999 .... [Unbeknownst to the conspirators, however, Lagrotteria was an informant for Customs and the United

States ... "DEA".] ... Lagrotteria was tasked with identifying an American company suitable for receiving the imported cocaine, particularly one with a warehouse in New York or New Jersey and a history of importing produce. ...

In April 1999, Customs and DEA agents fabricated records for a fictitious company they named "TJ Import Produce." They put the records in a Customs database and, on April 8, 1999, at the behest of the government agents, Lagrotteria informed Garravito-Garcia that he had identified TJ Import Produce as a potential recipient of the cocaine the conspirators hoped to import. A few days later, ... Jorge accessed the Customs computer database and examined the mock importation and inspection records for TJ Import Produce. Subsequently, Uribe informed Lagrotteria that TJ Import Produce had been investigated and was suitable.

Later that April, Lagrotteria traveled to Colombia to meet Juan .... Juan responded that, to make the conspiracy worth the risks involved, they needed to import at least 500 kilograms of cocaine .... When asked at trial why Juan required such a large amount of cocaine, Uribe explained that ... "Juan that told [him] ... that ... Jorge Reyeros, his brother, needed that quantity. ...." When asked what he meant when he said that Jorge

> wouldn't "work with" smaller quantities, Uribe testified, "It means that he wouldn't take little amounts of drugs to use his Customs position, ... He needed big deals. Big drug deals."
>
> Uribe also testified that ... the conspirators planned to ship the drugs through Ecuador, concealed in a cargo container purportedly holding bananas. ... Uribe further testified that the conspirators planned to elude detection by shipping multiple containers at one time, only one of which would contain drugs. Uribe stated that Jorge was going to ensure that Customs would inspect only the containers that did not contain drugs and would let the container with the drugs "go by." The conspirators never actually carried out their plan, however, because they were not able to acquire cocaine.

Appx. A4-7. The case against the petitioners was thus dependent on the testimony of two individuals -- confidential undercover informant Lagrotteria, a drug dealer for two decades who had four prior convictions, and "cooperating" co-defendant Uribe, an experienced Colombian cocaine smuggler who won his release from imprisonment in South America by agreeing to testify at the Reyeros trial. These witnesses relayed to the jury what would have been (but for the prosecutors' piggy-backing of the co-conspirator and admissions rules) double hearsay. The court below found this to be sufficient evidence

to support the convictions, as did both courts below. Appx. A7-12; Appx. B3-10.

c. Statement of Lower Court Jurisdiction

The United States District Court for the District of New Jersey had subject matter jurisdiction of this case under 18 U.S.C. § 3231; the indictment alleged federal offenses committed there. The court of appeals had jurisdiction under 28 U.S.C. § 1291.

REASONS FOR GRANTING THE WRIT

1. This case presents an important question of constitutional criminal procedure that has not been, but should be, addressed by this Court: the manner in which the Brady doctrine applies to U.S. prosecutors who work in cooperation with foreign authorities to obtain evidence and witnesses for use at trial.

This Court has held that government's duty to disclose favorable information to the defense extends beyond the prosecutor's own file to include material contained in the files of cooperating police agencies. See Kyles v. Whitley, 514 U.S. 419, 427-38 (1995) (noting prosecutor's duty to learn of, and disclose, exculpatory evidence "known to the others acting on the government's behalf in the case, including the police"); see also United States v. Valenzuela-Bernal, 458 U.S. 858 (1982) (applying Brady analysis to INS

deportation of alien witnesses). This Court has never addressed, however, how that duty applies to material contained in the files of foreign government agents or agencies. Given the increasing frequency of transnational criminal investigations, the Court should grant this petition to give the lower courts much needed guidance in this area.

Petitioners' case involved a joint venture by and between Colombia and the United States to prosecute petitioner Jorge Reyeros, an employee of the U.S. Customs Service, and his brother and co-petitioner Juan Reyeros, as well as a Colombian believed to have been Juan's contact there, Hernán Uribe. All relevant Colombian documents should have been disclosed. Yet the court below affirmed the district court's ruling excusing the government's failure to produce portions of Uribe's extradition file pursuant to Brady v. Maryland, 373 U.S. 83 (1963), and Giglio v. United States, 405 U.S. 150 (1972). The panel held that the government's Brady obligation was not implicated, because the defendants made an insufficient showing of U.S. control over the requested material. Appx. A12-25; 537 F.3d at 279-85.

The record suggests a great deal more than the routine "comity" between Colombia and the United States described by the court below. Appx. A20; 537 F.3d at 283. The United States, through the Departments of both State and Justice, enjoys a special and close law enforcement working relationship with Colombia, through its own Department of Justice. See www.state.gov/r/pa/ei/bgn/35754.htm#relations.

Through the exercise of the sovereign powers of both extradition and deportation, the two countries work in tandem on hundreds of cases resulting from joint investigations and mutual legal assistance. In petitioners' case, there was not simply an ordinary MLAT request[1] and a judicially neutral sovereign's response to an extradition effort. To the contrary, Uribe writes in one after-discovered document about a "declaration I gave to Prosecutor Muñoz at the beginning of 2001." CA3 J.A. 120.[2] Colombia had no occasion of its own to seek a "declaration" from Uribe at that time; the clear implication is that Muñoz, the Colombian prosecutor, was working in a joint venture with the U.S. prosecutors. Moreover, as a result of "this declaration," Uribe met again with the Colombian prosecutor and "the additional information that the prosecutor had requested, they [United States] needed even more information." CA3 J.A. 120. Uribe then describes being summoned to the Colombian prosecuting attorney's office. CA3 J.A. 120. Again, this is far more than just "comity."

In all, Uribe's letter describes some 20 promises made respectively by both the Colombian prosecutor, "and Doctor Colon to Prosecutor Muñoz and to me

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[1] "MLAT" means "Mutual Legal Assistance Treaty," a mechanism for one country to request production of evidentiary documents from another, or that foreign authorities conduct a deposition of a potential witness upon written interrogatories.

[2] "CA3 J.A." refers to the Joint Appendix filed by the petitioners as appellants in the Third Circuit.

through my attorney." CA3 J.A. 120.[3] (Carmen D. Colón, an attorney with the U.S. Department of Justice, Criminal Division, Narcotic and Dangerous Drug Section, was Legal Attaché at the U.S. Embassy in Bogotá.) These promises only served to further the United States prosecution, not the case for which Uribe was already serving a sentence in Colombia.

In general terms, the decision of the court below correctly described the analogous governing law when the federal prosecution is related to a state investigation, noting:

> We held that a case-by-case analysis was appropriate when considering a federal prosecutor's constructive knowledge, and we set forth three questions as relevant to the analysis: '(1) whether the party with knowledge of the information is acting on the government's "behalf" or is under its "control"; (2) the extent to which state and federal governments are part of a "team," are participating in a "joint investigation" or are sharing resources; and (3) whether the entity charged with constructive possession has "ready access" to the evidence.' *United States v. Risha*, 445 F.3d 298, 304 (3d Cir. 2006). The first question concerns the "intermingling" of the forces of the federal government with the forces of the state sovereign.

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[3] In Latin America, "Doctor" is the honorific title used when referring to lawyers.

Appx. A17-18; 537 F.3d at 281-82. Uribe does not state, in the withheld letter, that he gave an honorable and truthful statement. To the contrary, he states, "I gave the testimony that was asked of me." CA3 J.A. 120. This is pure Brady material and should have been disclosed. He notes that "testimony" was extracted after 18 months and 20 promises made through the United States prosecutor working in conjunction with the Colombian prosecutor, Muñoz, and to me through my attorney." CA3 J.A. 120. Throughout his letter, Uribe refers to American "pressure not to reveal the truth" and the United States "pressuring those who threatened to disclose its lies." CA3 J.A. 123. This critical but withheld evidence should have been made available to impeach the government witness, Hernan Uribe, whose credibility was essential to the case, when he later came forward to testify in conformity with the charges in the indictment that he had just a few years earlier so vigorously reviled.

Consequently, an objective factual analysis of "whether the party with knowledge of the information is acting on the government's behalf" and the question concerning whether Colombia and the United States was part of a "team" or "shar[ed] resources," Appx. A17; 537 F.3d at 282, would lead to the conclusion that the defense at least made a sufficient showing to require a full inquiry at an evidentiary hearing. Yet the court below held to the contrary.

Not aware of the the polite Fifth Amendment Due Process Brady term, "joint venture," Uribe's letter does not use that vocabulary. He refers instead to the inter-sovereign cooperation in his case, and thus in the petitioners' case, as a "conspiracy." But the meaning is clear. The undisclosed letter Uribe authored to the Colombian Attorney General complains of unfair treatment by U.S. authorities with the full agreement of Colombian officials, and thus queries:

> Please ask yourself the question, if this conspiracy took place at the Bunker [the American Embassy] in Bogota with a specialized prosecutor heading the team, a few meters from the Office of the Attorney General of the Republic, imagine what procedural guarantees I would have once I am extradited?

CA3 J.A. 121. Uribe is describing the setting of a "joint effort" and "joint venture" by and between the prosecutors of the United States and Colombia that meets every definitional requirement described in the panel's opinion, yet the conclusion reached is to the contrary. The inference that the Third Circuit apparently drew from the facts that it does consider is exactly backwards: that Colombian authorities, in response to a treaty request which obligated them merely to obtain Uribe's responses to a set of written interrogatories, instead read him those questions and then withdrew from the interview room to allow Uribe to be interrogated for two days, with no Colom-

bian oversight, by U.S. criminal investigators (see Appx. A20; 537 F.3d at 283) tends to prove not independence but an intimate if subservient cooperation.

The facts in United States v. Antone, 603 F.2d 566 (5th Cir. 1979), recognized by the panel as a leading case of this type nationally, Appx. A16-17; 537 F.3d at 281-82, describe a task force of FBI and state agents. 603 F.2d at 568-69. Uribe's undisclosed statement describes a task force including prosecutors from two separate countries working together to obtain and extract "testimony that was asked of me," CA3 J.A. 120, from a crucial government witness. The timing of the Uribe extradition is revealing, since it worked to serve the United States' prosecutorial interests, not to fit Colombian law. Uribe had been subject to a U.S. indictment for many years but somehow made his way to the United States of America a mere day or so before the conclusion of a months' long trial and just in time to put the proverbial nail in the coffin of conviction -- without affording the defense time to prepare for this development. And yet Uribe arrived on our shores with no file of pertinent documents such as would be disclosed in relation to any other such witness if he had not been in foreign custody. Factually, the timing of Uribe's extradition, particularly viewed in the context of both the initial indictment and the termination date of trial evidence, strongly suggests Colombia worked on behalf of the United States. In United States v. Peterson, 812 F.2d 486, 489-90 (9th Cir. 1987), an opinion authored by Justice Kennedy,

the Circuit held that the district court had erred in failing to find a joint U.S.-Filipino venture, requiring the court to address the legality of a wiretap and resulting suppression issues.

The terms used by government witness Uribe to describe the degree of intimate cooperation between Colombia and the United States to aid the District of New Jersey prosecution team is the clearest proof that the defendants were entitled to a remand for an evidentiary hearing. As Uribe put it:

> The conspiracy of Doctor Colon, the U.S. prosecutor, and the three Customs agents took place as if the Bunker [American Embassy] were on their own U.S. soil, but even more frightening and inexplicable was the violation to which the Attorney General's Office [of Colombia] lent itself with the entire complicity.

CA3 J.A. 121.

The undisclosed evidence concerning Uribe's statements may only be the tip of the proverbial iceberg. It does provide a factual basis to show a "joint venture." The panel suggests that the May 2004 letter is "strikingly similar to Uribe's July 2004 letter to the Colombian Magistrate," Appx. A22; 537 F.3d at 284 n.18, which was disclosed to the defense and used at trial. See CA3 J.A. 446, Exh. J-74A. The July letter does help show the dominant role of the United States in the joint law-enforcement venture between the U.S. and Colombia, but it does not contain the kind of exculpatory and impeaching state-

ments found in the May 2004 letter that was withheld at trial but later discovered. The court below ruled out consideration of the earlier letter (a decision discussed under Reason 2 of this Petition), thus closing its eyes to the most telling proof, Uribe's undisclosed letter. It thereby reached an unsupportable decision.

The facts in this case may have unique aspects, but the overall problem is a general and exceptionally important one. The Third Circuit suggests that the courts should be reluctant to find a Brady obligation in international cases than in case of a joint state-federal investigation. Appx. A19; 537 F.3d at 283 (where the case "involves a foreign sovereign," the issues "implicate[d] ... may well make a showing of effective federal control ... more sensitive and demanding" than in a federal-state context). The Court should grant the writ to address this important question. Requiring U.S. authorities to keep and produce all pertinent records in cooperative international criminal investigations does not undermine the sovereignty or independence of foreign governments. It simply protects the Due Process rights of U.S. citizens and others who are eventually prosecuted in this country.

One further (and closely related) issue in this case is within the scope of the Question on which certiorari should be granted. The court below held under Fed.R. Crim.P. 26.2[4] that documents on file

[4] In 1979, this Rule of Procedure largely superseded 18 U.S.C. § 3500, the Jencks Act, even though courts have

with a foreign magistrate acting in response to a United States request for international extradition are not "possessed" by the government. For this proposition, the Third Circuit cited as its closest support a near-30-year-old Ninth Circuit case. Appx. A23; 357 F.3d at 284, citing United States v. Friedman, 593 F.2d 109, 120 (9th Cir. 1979); see also Appx. A24; 357 F.3d at 285. But Friedman actually holds that evidence in the hands of a foreign government is not "possessed" by the United States if "the federal government had no access to the evidence." 593 F.2d at 120. In United States v. Paternina-Vergara, 749 F.2d 993, 997-98 (2d Cir. 1984), on the other hand, the Second Circuit distinguished Friedman and held that the government must undertake a "good-faith effort to obtain the statements of prosecution witnesses in the possession of the foreign government." 749 F.2d at 998; accord United States v. Yousef, 327 F.3d 56, 129 (2d Cir. 2003).

The denaturalization case of Demjanjuk v. Petrovsky, 10 F.3d 338 (6th Cir. 1993), provides the best-known and most thorough exploration of the issue of Brady in the context of foreign documents. After Demjanjuk was extradited to Israel, where he was tried and acquitted on a genocide charge that carried the death penalty, the United States sought his denaturalization for failure to disclose his prior

_____(cont'd)

continued to refer to the Act as if it controlled; but see 28 U.S.C. § 2072(b) (Rules Enabling Act: "All laws in conflict with such rules shall be of no further force or effect ....").

service as a Nazi concentration camp guard. The Sixth Circuit held that Justice Department officials acted with reckless disregard for the government's due process obligations in failing to produce several categories of key documents from Soviet and Polish files. 10 F.3d at 342-44. In Demjanjuk, the United States conducted its own investigation of the underlying conduct in conjunction with law enforcement authorities from other countries and thus possessed the requested Brady evidence. The Sixth Circuit concluded that the government was making the same "right hand did not know what the left hand was doing" argument that was rejected in Giglio v. United States, 405 U.S. 150 (1972). The argument should have been rejected here as well.

In the course of explaining why the Fifth Amendment privilege ordinarily does not protect against an asserted fear of foreign prosecution, this Court recognized a very similar exception:

> This is not to say that cooperative conduct between the United States and foreign nations could not develop to a point at which a claim could be made for recognizing fear of foreign prosecution under the Self-Incrimination Clause as traditionally understood. If it could be said that the United States and its allies had enacted substantially similar criminal codes aimed at prosecuting offenses of international character, and if it could be shown that the United States was granting

> immunity from domestic prosecution for the purpose of obtaining evidence to be delivered to other nations as prosecutors of a crime common to both countries, then an argument could be made that the Fifth Amendment should apply based on fear of foreign prosecution simply because that prosecution was not fairly characterized as distinctly "foreign." The point would be that the prosecution was as much on behalf of the United States as of the prosecuting nation, so that the division of labor between evidence gatherer and prosecutor made one nation the agent of the other, rendering fear of foreign prosecution tantamount to fear of a criminal case brought by the Government itself.

United States v. Balsys, 524 U.S. 666, 698 (1998). In petitioners' case, the evidence was gathered both by Colombia and by the United States, but only in pursuit of U.S. charges. The prosecuting authority was the United States. However, "the division of labor ... made one nation the agent of the other." Id.

Analogous precedent from the context of suppression motions arising out of international investigations further supports petitioners' position. If American law enforcement officials substantially participate in a foreign search, or if the foreign authorities actually conducting the search were acting as agents for their American counterparts, the exclusionary rule can be invoked. See United States

v. Rosenthal, 793 F.2d 1214, 1230-31 (11th Cir. 1986). In a variety of contexts, when the United States acts in concert with another sovereign in a criminal investigation, the laws of each sovereign may apply to the evidence obtained during the course of the joint investigation. For example, evidence may be excluded as the fruit of an "unreasonable" search and seizure directly under the Fourth Amendment where United States law enforcement officers are shown either to have "substantially" participated in a foreign search, or to have controlled the operation so that the foreign law enforcement officials were, in effect, acting as American agents in a "joint venture." United States v. Behety, 32 F.3d 503 (11th Cir. 1994).[5] In this context, the files and documents and letters written by Uribe, including one particularly significant letter not disclosed to defense counsel at trial, required disclosure consistent with the due process clause. The cooperative conduct in this case is well evidenced by the exhibits that were produced by the government to the defense. It is the further material that was not produced but which was available to the U.S. government that gives rise to the issues which merit a grant of certiorari.

Surely any suggestion that the American judicial attaché in the Bogotá embassy -- a detailed federal

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[5] Accord United States v. Maturo, 982 F.2d 57, 60 (2d Cir. 1992); United States v. Mitro, 880 F.2d 1480 (1st Cir. 1989); Stowe v. Devoy, 588 F.2d 336, 341 (2d Cir. 1978); United States v. Toscanino, 500 F.2d 267, 280 (2d Cir. 1974).

prosecutor -- is incapable of obtaining copies of official records of a Colombian judicial proceeding, created in response to a formal U.S. request for action, even when the originals of those files are "in court" (as the prosecutor put it here), cannot be taken seriously. At the very least, an evidentiary hearing into the veracity of such a counter-intuitive assertions should have been allowed. The government's failure to secure and turn over the Uribe extradition documents, of which it well knew, cannot be justified.

The decision of the court below creates a loophole for prosecutorial nondisclosure of critical cross-examination materials in the increasing number of federal criminal cases with an international aspect featuring inter-sovereign coordination. Just to cite recent Third Circuit examples, it is clear that many of these are not drug cases. See, e.g., United States v. Hoffecker, 530 F.3d 137, 156-58 (3d Cir. 2008) (telemarketing fraud); United States v. Frank, 195 Fed.Appx. 114 (3d Cir. 2006) (electronic distribution of child pornography); United States v. Atiyeh, 402 F.3d 354, 362-67 (3d Cir. 2005) (internet gambling).

It is now impossible to know completely how the defense could have developed its attack on the government's incredible and unreliable witnesses (not only Uribe, but also Lagrotteria and others), had all legally required disclosures been made freely, openly, and on a timely basis, instead of piecemeal, incompletely, and as late as possible. No claim that the omissions were immaterial could possibly prevail.

Rather than affirm, the Third Circuit should at least have remanded for a full evidentiary inquiry.

To address both the Brady and "Jencks" (Rule 26.2) aspects, and to articulate when a defendant is entitled to an evidentiary hearing on the scope of the involvement of U.S. authorities with any foreign assistance rendered to the investigation, the petition for certiorari should be granted.

2. The decision of the court below conflicts with this Court's and other circuits' cases addressing the scope of appellate review, including the doctrine of appellate judicial notice.

The Third Circuit reached its conclusion of an insufficient showing to require a hearing on the Brady claim by excluding from consideration the petitioners' most compelling evidence. Hernán Uribe authored a letter in Combita prison, which he sent to the Attorney General of Colombia in May 2004. CA3 J.A. 112. Copies were sent to the Colombian Constitutional Court and to the "Defensoria del Pueblo,"[6] where the letter was received on June 2, 2004. CA3 J.A. 117. The letter was retrieved for the defense

[6] While officially and literally translated as "public defender," CA3 J.A. 117, it is counsel's understanding that the function of this office is as a national human rights ombudsman and not (as those words imply in American English) as counsel to those unable to hire their choice of attorney in criminal cases.

after trial (in July 2005) by a Colombian attorney from the Colombian court's extradition file (CA3 J.A. 112-31), from which other documents had been produced to the defense. In the third paragraph of footnote 18 of the decision, the court below ruled that Uribe's letter could not be considered in ruling on the instant direct appeal because it is "not properly part of the record on appeal." Appx. A21-22; 537 F.3d at 284 n.18. On that critical procedural ruling turned the outcome of the case. The decision to ignore the May 2004 letter is highly debatable and appears inconsistent with this Court's cases and the approach in other Circuits. Certiorari should be granted to consider this ruling as well.

The government never complained in its lengthy and detailed brief on appeal concerning the Brady issue (or at argument) that the existence of the May 2004 letter was beyond the court of appeals' ken. Instead, the government fully addressed the argument in question. Nor did the government ever question the letter's authenticity or its provenance. See Gov't Br. (3d Cir. Nos. 06-1485 & 06-1486), at 25-41. Accordingly, all such arguments were waived by the United States as appellee and should not have formed the basis for the Third Circuit's decision. See United States v. Dunkel, 927 F.2d 955, 956 (7th Cir. 1991) (per curiam); cf. Beazer East, Inc. v. Mead Corp., 412 F.3d 429, 437 n.11 (3d Cir. 2005) ("appellee 'waives, as a practical matter anyway, any objections not obvious to the court to specific points urged by the appellant'" (quoting Seventh Circuit)).

The refusal of the court below to take cognizance of the May 2004 Uribe letter, where the government had not sought that protection, is also out of step with this Court's authority. "The rule that points not argued will not be considered ... at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one." United States v. Burke, 504 U.S. 229, 246 (1992) (Scalia, J., concurring in judgment) (ellipsis original). Cf. Steagald v. United States, 451 U.S. 204, 209 (1981) ("The government ... may lose its right to raise factual issues of this sort before [an appellate] Court ... when it has failed to raise such questions in a timely fashion during the litigation."); Giordenello v. United States, 357 U.S. 480, 488 (1958). For this reason, the Court should grant certiorari and, upon full review, direct the Third Circuit to reopen its consideration of the Brady issue, taking into account all the available evidence.

The May 2004 letter shows on its face (by the file stamp of the "Defensoria del Pueblo," CA3 J.A. 112) that it comes from an official Colombian government file. Its autenticity is unchallenged. It is therefore subject to appellate judicial notice. Fed.R.Evid. 201(f), 1101(a) (appellate court may take judicial notice). This Court's own practice provides examples. See Dobbs v. Zant, 506 U.S. 357 (1993) (per curiam) (held: court of appeals erred in refusing to take judicial notice of transcript of earlier proceeding in case which had been thought lost and thus not presented in district court); Massachusetts v. Westcott,

431 U.S. 322 (1977) (per curiam) (summarily reversing criminal conviction, based on judicial notice of record of federal agency, citing Fed.R.Evid. 201(b)); see also, e.g., United States v. Garland, 991 F.2d 328, 332-33 (6th Cir. 1993) (taking notice of foreign judicial document). As Justice Breyer explained, while serving on the First Circuit, a court of appeals may properly take judicial notice of the contents of documents from other courts, where a copy appears in appendix although not in record and no party disputes authenticity. See E.I. DuPont de Nemours & Co. v. Cullen, 791 F.2d 5, 7 (1st Cir. 1986).

Taking that additional evidence into consideration, the petitioners' proof of a joint prosecution effort sufficient to create U.S. Brady obligations is compelling. The background, before considering Uribe's letter, shows a degree of collaboration that was extraordinary whether measured by the nomenclature "joint investigation" or "joint venture" or otherwise. The specific facts supporting a collaboration investigation pertain to: (1) the timing of Uribe's extradition, (2) the Colombian prosecutor's facilitation of a two-day, unsupervised interview of Uribe by United States Customs Service agents, rather than through the use of interrogatories as otherwise authorized by the MLAT treaty provisions, and (3) the personal intervention of the DOJ Embassy Attaché, U.S. Narcotics and Dangerous Drug Section prosecutor Colón. In this light, the Third Circuit misapprehended the extent of the interplay between Colombia and the United States and thus erroneously

concluded there was no constructive possession of Colombian documents by members of the U.S. prosecutorial team.

The crucial corroborative witness, Uribe, specifically makes reference in his letter to comments, threats and promises by the Colombian prosecutor concerning his American indictment. The strongest evidence and most compelling proof concerning the collaborative and cooperative effort between prosecutors of separate sovereigns, that truly meets any governing legal standard, is the specific words of the witness, Uribe, the only individual to corroborate the prosecution's paid cooperating witness, Lagrotteria. Uribe states:

> [P]ersuasively and insistently throughout the rest of 2001, the same U.S. prosecutor called Prosecutor Muñoz -- that she herself told me -- no less than four times. Also -- according to Prosecutor Muñoz -- Doctor Colón herself personally came to speak to her, impatiently telling her how urgently the prosecutor, the Customs Agents and she needed to meet with me. Thus, with the firm intention of deceiving, work precisely to that end to deceive Prosecutor Muñoz, the Attorney General of the Republic -- and all of this was done, as is very well known, in the shadow of dark workings of U.S. "justice."

CA3 J.A. 119 (emphasis added). The question of U.S. and Colombian collaboration, cooperation, beyond the

treaty-mandated mutual assistance, must take into account the withheld letter(s) authored by Uribe. Uribe also states, "the prosecutor, in his zeal to flesh out and polish the Indictment against me and others, used Prosecutor Muñoz, and with her the entire Colombian legal system, to continue with this deceit." CA3 J.A. 119. Surely, a remand for a hearing was warranted to ascertain just what Uribe meant by this comment.

The Court should grant certiorari to review the decision of the court not only in its overly stringent concept of the showing necessary to trigger a hearing into whether Brady obligations have arisen from a cooperative international investigation and prosecution effort, but also to review the Third Circuit's refusal to take cognizance of the petitioners' most potent evidence.

CONCLUSION

For the foregoing reasons, petitioners JORGE REYEROS and JORGE REYEROS pray that this Court grant their petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit affirming their convictions.

Respectfully submitted,

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March 9, 2009
(type size corrected, April 27, 2009)

APPENDIX A

Cite as: 537 F.3d 270

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 06-1485, 06-1486

UNITED STATES of America,

v.

JORGE REYEROS and JUAN REYEROS,

Appellants.

Argued: April 17, 2008.
Filed: July 31, 2008.

***274** Peter Goldberger [Argued], Law Office of Peter Goldberger, Ardmore, PA, Paul D. Petruzzi, Neil M. Schuster, Miami, FL, for Appellant Jorge Reyeros.

Neil M. Schuster [Argued], Miami, FL, for Appellant Juan Reyeros.

George S. Leone, Caroline A. Sadlowski [Argued], Office of United States Attorney, Newark, NJ, for Appellee USA.

Before: SLOVITER, JORDAN, and ALARCÓN*, Circuit Judges.

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* Honorable Arthur L. Alarcón, Senior Judge, United States Court of Appeals for the Ninth Circuit, sitting by designation.

JORDAN, Circuit Judge.

A jury convicted Jorge Reyeros and his brother, Juan Reyeros, of offenses related to a conspiracy to import cocaine into the United States.[1] On appeal, each brother challenges his conviction and Juan additionally challenges his sentence. Although both raise a number of issues on appeal, we focus primarily on, first, Jorge's contention that the evidence was insufficient to establish beyond a reasonable doubt that he knew that the purpose of the conspiracy was to import cocaine and, second, the brothers' shared contention that they were improperly denied access to certain documents in the possession of the Colombian government, in violation of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) and the Jencks Act, 18 U.S.C. § 3500. For the reasons set forth below, we will affirm.

I. Background

On August 20, 2004, a federal grand jury sitting in the District of New Jersey returned a second superseding indictment (the "Indictment") against Jorge, Juan, Hernan Uribe, and Rafael Garravito-Garcia. During the time period charged in the Indictment, Jorge was employed as an inspector for the United States Customs Service[2] ("Customs") in New Jersey. Counts 1 through 4

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[1] For convenience, we will refer to the brothers by their first names.

[2] In 2003, after the events at issue here, the United States Customs Service was divided into the Bureau of Customs and Border Protection and the Bureau of Immigration and Customs Enforcement, both of which are part of the Department of Homeland Security. Reorganization Plan Modification for the Department of Homeland Security, H.R. Doc. No. 108-32 (2003).

of the Indictment named only Jorge and charged him, in Count 1, with conspiracy to import cocaine, in violation of 21 U.S.C. § 963, and, in Counts 2 through 4, with exceeding authorized access to a Customs computer, in violation of 18 U.S.C. §§ 1030(a)(2)(B), (c)(2)(B) and 2. Specifically, the Indictment alleged that, in 1997, Jorge conspired with unnamed co-conspirators to import into the United States cocaine concealed in cargo containers. It also alleged that Jorge had, on multiple occasions in 1997, unlawfully accessed a Customs computer database, obtained information identifying containers designated for inspection by Customs, and provided that information to his co-conspirators in furtherance of the conspiracy.

***275** Count 5 of the Indictment charged Jorge, Juan, Uribe, and Garravito-Garcia with a separate conspiracy to import cocaine, in violation of 21 U.S.C. § 963, while Count 6 charged them with exceeding authorized access to a Customs computer and aiding and abetting exceeding authorized access, in violation of 18 U.S.C. §§ 1030(a)(2)(B), (c)(2)(B) and 2.[3] The allegations of Count 5 are that, in 1999, Jorge, Juan, Uribe, and Garravito-Garcia agreed to import cocaine into the United States from Ecuador, concealed in cargo containers filled with produce bound for Port Elizabeth, New Jersey. Count 6 describes how, in furtherance of that conspiracy, Jorge unlawfully accessed a Customs computer database in 1999 to research a company his co-conspirators had identified as a potential recipient of the smuggled cocaine.

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[3] The defendants were also charged with having attempted to exceed authorized access, but it appears that aspect of the charge was not a focus at trial.

The trial against Jorge and Juan began in October 2004. At some point, Juan moved for severance;[4] however, his request was denied by the District Court. Thus, at trial the government presented evidence of the 1997 conspiracy and associated charges set forth in Counts 1 through 4 of the Indictment, which named only Jorge as a defendant, and it also presented evidence of the 1999 conspiracy and unauthorized access charges set forth in Counts 5 and 6 of the Indictment, which named both Jorge and Juan along with Uribe and Garravito-Garcia.

Uribe testified at trial on behalf of the government. When the trial began, Uribe was in a Colombian prison, where he was serving a sentence for drug trafficking and conspiracy. He was, however, extradited to the United States during the trial and immediately entered into a plea agreement pursuant to which he agreed to cooperate with the government.[5] At trial, Uribe testified that he became involved in the 1999 conspiracy when Juan asked him for help identifying an American company through which 400 to 500 kilograms of cocaine could be imported into the United States. Uribe stated that Juan told him that Jorge was a Customs inspector and could use that position to ensure containers containing drugs could enter the United States without being inspected.

Uribe described how he sought the help of Garravito-Garcia to find an American company suitable to

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[4] It is not clear from the record when Juan first made that motion.

[5] The charges against Garravito-Garcia, the fourth defendant named in the Indictment, were dismissed without prejudice on January 18, 2007, apparently because the government has been unable to locate him.

receive the smuggled cocaine. Garravito-Garcia, in turn, contacted an American acquaintance, James Lagrotteria, for assistance. Unbeknownst to the conspirators, however, Lagrotteria was an informant for Customs and the United States Drug Enforcement Administration ("DEA").

Garravito-Garcia introduced Uribe to Lagrotteria in Colombia in March 1999 and the three men met to discuss plans to import cocaine into the United States. At that meeting, Lagrotteria was tasked with identifying an American company suitable for receiving the imported cocaine, particularly one with a warehouse in New York or New Jersey and a history of importing produce. Lagrotteria was told that the conspirators were working with a Customs official[6] and that the official planned to *276 check a Customs computer database to see if any company Lagrotteria identified had been flagged by Customs as having previously imported contraband.

In April 1999, Customs and DEA agents fabricated records for a fictitious company they named "TJ Import Produce." They put the records in a Customs database and, on April 8, 1999, at the behest of the government agents, Lagrotteria informed Garravito-Garcia that he had identified TJ Import Produce as a potential recipient of the cocaine the conspirators hoped to import. A few days later, on April 12, 1999, Jorge accessed the Customs computer database and examined the mock importation and inspection records for TJ Import Produce. Subsequently, Uribe informed Lagrotteria that TJ Import Produce had been investigated and was suitable.

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[6] At some point, again it is not clear, Lagrotteria became aware of Juan's and Jorge's roles in the conspiracy, including that Jorge was the insider at Customs.

Later that April, Lagrotteria traveled to Colombia to meet Juan and to discuss with Uribe and Juan the conspirators' plans to import cocaine. At that meeting, Uribe informed Juan and Lagrotteria that he was having trouble locating 500 kilograms of cocaine. Juan responded that, to make the conspiracy worth the risks involved, they needed to import at least 500 kilograms of cocaine, and he suggested that the conspirators try to locate and pool together smaller quantities of cocaine in order to amass a large quantity. When asked at trial why Juan required such a large amount of cocaine, Uribe explained that Juan "told [him] many, many times that Jorge needed that quantity -- Jorge Reyeros, his brother, needed that quantity. He wouldn't work with other quantities, two or three hundred, or a hundred, it wasn't any good for him." (Supplemental Appendix ["SA"] 3145.) When asked what he meant when he said that Jorge wouldn't "work with" smaller quantities, Uribe testified, "It means that he wouldn't take little amounts of drugs to use his Customs position, it would be too little of a deal. He needed big deals. Big drug deals." (Id.)

Uribe also testified that, instead of shipping cocaine directly from Colombia to the United States, the conspirators planned to ship the drugs through Ecuador, concealed in a cargo container purportedly holding bananas. According to Uribe, Juan explained that the container of drugs should be shipped from Ecuador instead of Colombia because Jorge had said it was "impossible to take anything out of Colombia." (SA 3176.) Uribe further testified that the conspirators planned to elude detection by shipping multiple containers at one time, only one of which would contain drugs. Uribe stated that Jorge was going to ensure that Customs would inspect only the containers that did not contain drugs and

would let the container with the drugs "go by." (SA 3148.) The conspirators never actually carried out their plan, however, because they were not able to acquire cocaine.

The jury found Jorge and Juan guilty of the charges alleged in Counts 5 and 6 of the Indictment. It also specifically found, through special interrogatories, that Jorge and Juan had conspired to import more than 150 kilograms of cocaine and that Jorge had unlawfully accessed the Customs computer database in furtherance of the conspiracy. The jury acquitted Jorge of the charges alleged in Counts 1 through 4.

After trial, Jorge and Juan each moved for a judgment of acquittal on Counts 5 and 6. In addition, each moved for a new trial on a number of grounds, including erroneous evidentiary rulings, violations of the disclosure obligations imposed by *277 Brady,[7] and prosecutorial misconduct during closing arguments. The District Court denied the defendants' post-trial motions, and, on January 26, 2006, sentenced Jorge to 292 months in prison and Juan to 235 months in prison.

On appeal, Jorge and Juan challenge their convictions and Juan challenges his sentence. We have jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

II. Discussion

A. Sufficiency of the evidence

Jorge argues that, because the evidence presented at trial was insufficient to permit the jury to find him guilty beyond a reasonable doubt, the District Court erroneously denied his motion for a judgment of acquittal on Counts 5

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[7] During trial, the defendants sought and were denied information that they contended was covered by the Jencks Act.

and 6. As noted earlier, Count 5 charged Jorge, Juan, Uribe, and Garravito-Garcia with conspiring to import cocaine, in violation of 21 U.S.C. § 963,[8] and Count 6 charged them with exceeding authorized access in furtherance of the conspiracy to import cocaine, and aiding and abetting exceeding authorized access, in violation of 18 U.S.C. §§ 1030(a)(2)(B), (c)(2)(B) and 2.[9] Jorge's challenge to the sufficiency of the evidence is a narrow one: he argues that his convictions must be vacated because the government failed to introduce sufficient evidence to establish that he knew that the specific object of the conspiracy was to import cocaine.[10] We disagree.

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[8] Section 952 of Title 21 prohibits the importation of a controlled substance into the United States, and § 960 of that title sets forth the penalties for importing a controlled substance in violation of § 952. Section 963 of Title 21 provides that "[a]ny person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

[9] Section 1030(a)(2)(B) of Title 18 prohibits exceeding authorized access of a computer and thereby obtaining information from a United States agency, and § 1030(c)(2)(B) provides an enhanced maximum penalty for violations of subsection (a)(2), "if ... the offense was committed in furtherance of any criminal or tortious act in violation of the Constitution or laws of the United States...." The Indictment alleged that Jorge's violation of § 1030(a)(2) was committed in furtherance of the conspiracy to import cocaine alleged in Count 5.

[10] Jorge argues that if we vacate his conviction for conspiring in violation of 21 U.S.C. § 963 (Count 5), his conviction for exceeding unauthorized access of a Customs computer in violation of 18 U.S.C. § 1030 (Count 6) must also be vacated. The government does not address that argument. And, in light of our

In reviewing a challenge to the sufficiency of the evidence, we apply a "particularly deferential" standard of review. United States v. Cothran, 286 F.3d 173, 175 (3d Cir. 2002) (quoting United States v. Dent, 149 F.3d 180, 187 (3d Cir. 1998)). We do not weigh the evidence or decide the credibility of the witnesses. Id. Instead, "[w]e must view the evidence in the light most favorable to the Government and sustain the verdict if any rational juror could have found the elements of the crime beyond a reasonable doubt." Id.

"One of the requisite elements the government must show in a conspiracy case is that the alleged conspirators shared a 'unity of purpose', the intent to achieve a common goal, and an agreement to work together toward the goal." United States v. Wexler, 838 F.2d 88, 90 (3d Cir.1988) (citing United States v. Kates, 508 F.2d 308, 310-11 (3d Cir. 1975)). Accordingly,*278 "[i]n order for us to sustain a defendant's conviction for conspiracy, the government must have put forth evidence 'tending to prove that defendant entered into an agreement and knew that the agreement had the specific unlawful purpose charged in the indictment.'" United States v. Idowu, 157 F.3d 265, 268 (3d Cir.1998) (quoting Wexler, 838 F.2d at 91).

Jorge acknowledges that the evidence presented by the government is sufficient to support a finding that he accessed the Customs computer database for an improper reason. It is a concession practically compelled by the evidence. Jorge researched the importation and inspection records of the fictitious TJ Import Produce within a few days of Lagrotteria telling Garravito-Garcia that he had

_____(footnote continued)

decision to affirm Jorge's conspiracy conviction, we will not address it either.

identified that company as a potential vehicle for importing cocaine. After Jorge accessed those records, Uribe informed Lagrotteria that TJ Import Produce had been investigated by his contact in Customs and was an acceptable recipient of the to-be-smuggled cocaine. The evidence is thus damning enough that, when viewed in the light most favorable to the government, it is more than sufficient to support a finding that Jorge knew the purpose of the conspiracy was to import some form of contraband. Cf. United States v. Iafelice, 978 F.2d 92, 97 n. 3 (3d Cir.1992) ("There is no requirement ... that the inference drawn by the jury be the only inference possible or that the government's evidence foreclose every possible innocent explanation."). That finding is further supported by Uribe's testimony that the conspirators planned to ship the container full of drugs from Ecuador instead of Colombia because Juan relayed that Jorge had said it was "impossible to take anything out of Colombia." (SA 3176.)

Perhaps recognizing that the evidence supports the conclusion that he knew he was involved in a conspiracy to bring something illegal into the country, Jorge argues on appeal that the record fails to show he knew the specific purpose of the conspiracy was to import cocaine, rather than some other form of contraband. To support his argument, Jorge cites a number of cases in which we reversed drug possession and distribution conspiracy convictions for lack of evidence that the defendant knew the purpose of the conspiracy involved drugs. See, e.g., United States v. Cartwright, 359 F.3d 281, 286-90 (3d Cir.2004); Idowu, 157 F.3d at 268-70; United States v. Thomas, 114 F.3d 403, 405-06 (3d Cir.1997); United States v. Salmon, 944 F.2d 1106, 1113-15 (3d Cir.1991); Wexler, 838 F.2d at 91-92. For example, Jorge relies on

Wexler, in which we held that evidence sufficient to support a finding that a defendant acted as a lookout for a drug transaction was nevertheless insufficient to support a finding that the defendant was aware that drugs were involved in the transaction. Wexler, 838 F.2d at 91-92. Although we noted in that case that it was "more likely than not that [the defendant] suspected, if not actually knew, that some form of contraband was involved" in the transaction for which he acted as a lookout, we concluded that the record lacked any evidence from which the jury could reasonably infer that the defendant knew that the contraband involved was drugs. Id. at 92. There, we reasoned that the evidence was "just as consistent ... with a conspiracy to transport stolen goods, an entirely different crime." Id.; see also Idowu, 157 F.3d at 266-67 ("[E]ven in situations where the defendant knew that he was engaged in illicit activity, and knew that 'some form of contraband' was involved in the scheme in which he was participating, the government is obliged to prove beyond a reasonable doubt that the defendant had knowledge of *279 the particular illegal objective contemplated by the conspiracy.").

In this case, however, unlike in Wexler and the other cases cited by Jorge, there is no evidentiary deficiency. Here, the government offered evidence showing that Jorge knew full well that the purpose of the conspiracy was to import a massive amount of cocaine. Uribe testified that, at an April 1999 meeting with Lagrotteria and Juan, he told them he was having trouble locating 500 kilograms of cocaine. According to Uribe, Juan insisted that they needed to import at least that much because, as Uribe elaborated, Juan said "many, many times that Jorge needed that quantity -- Jorge Reyeros, his brother, needed that quantity. He wouldn't work with other quantities,

two or three hundred, or a hundred, it wasn't any good for him."[11] (SA 3145.) As earlier noted, when asked what was meant by saying that Jorge wouldn't "work with" smaller quantities of cocaine, Uribe testified, "It means that he wouldn't take little amounts of drugs to use his Customs position, it would be too little of a deal. He needed big deals. Big drug deals." (Id.) That testimony is sufficient to allow a rational juror to conclude beyond a reasonable doubt that Jorge was aware that the purpose of the conspiracy was to import cocaine, as opposed to some other form of contraband.[12] We therefore reject Jorge's challenge to the sufficiency of the evidence.

B. Brady and Jencks

Next, the defendants contend that the District Court erred in failing to order the prosecution to turn over documents filed with Colombian authorities by Uribe as he opposed his extradition to the United States. The defendants acknowledge that, at the time of the trial, the documents they sought were not, and had never been, in the actual possession of the United States government.

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[11] In context, the plain implication is that Jorge was speaking not only about some controlled substance but specifically about cocaine, and the jury specifically found that object of the conspiracy was to import cocaine.

[12] Other evidence supports that conclusion as well. For example, a jury could reasonably infer that Jorge would ask his own brother, Juan, the nature of the contraband for which he was putting his Customs career at risk. In addition, Lagrotteria testified that Jorge was to receive a percentage of the value of any cocaine imported, which suggests that Jorge would want to know the nature of the contraband so that he could understand the expected payoff. Those pieces of evidence buttress the direct statement of knowledge attributed to Jorge by his brother Juan.

The District Court held that, under the circumstances, the United States government was not obligated to obtain and produce documents that the government had never seen and that were in the possession of a foreign sovereign. We agree with that ruling.

Uribe was first named as a defendant in this case in a superseding indictment returned by the grand jury on June 28, 2001.[13] Counts 5 and 6 of the first superseding indictment charged Jorge, Juan, Uribe, and Garravito-Garcia with conspiracy to import cocaine, attempting to exceed authorized access to a Customs computer, and aiding and abetting the attempt to exceed authorized access. When the first superseding indictment was returned in 2001, Uribe was, as we have noted, in a Colombian prison serving a sentence for drug trafficking and conspiracy. While investigating this case, the United States ***280** sought to question Uribe. To that end, it sent to the government of Colombia a document entitled, "Vienna Convention Mutual Legal Assistance Request." (SA 3753.) The request asked Colombian authorities to interview Uribe using questions provided by the United States and then to provide a written summary of Uribe's responses. But instead of questioning Uribe and providing his answers to the United States, Colombian authorities permitted United States Customs investigators to personally interview Uribe in Colombia.

That interview took place over the course of two days on November 19 and 20, 2002 and was memorialized

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[13] The original indictment was returned by the grand jury on December 21, 2000, and it charged Jorge and Juan with a single count of conspiring to exceed unauthorized access to a Customs computer database.

by Customs investigators in a written report.[14] The report indicates that, before the interview, María Cristina Muñoz, a Colombian prosecutor, read to Uribe and his attorney the questions contained in the United States' Mutual Legal Assistance Request in the presence of the Customs investigators and Carmen Colon, a United States Department of Justice Judicial Attache. After Munoz finished reading the questions, Munoz and Colon left the room and the Customs investigators interviewed Uribe.

Following the interview, the United States asked Colombia to extradite Uribe to face the charges in Counts 5 and 6 of the first superseding indictment. Uribe opposed extradition but failed to prevent it; he arrived in the United States on December 13, 2004, after the grand jury returned the second superseding indictment, and after the trial of Jorge and Juan had begun. The same day Uribe arrived, he entered into a plea agreement which provided that he cooperate with the United States government and plead guilty to conspiracy to import cocaine into the United States. The next day, he pled guilty in accordance with the agreement, and, two days after that, he testified on behalf of the government at the trial of Jorge and Juan.

When it became apparent that Uribe was coming to the United States and would testify, the defendants asked the District Court to compel the prosecution to obtain and produce, among other things, any documents Uribe had filed with Colombian authorities to oppose his extradition. The defendants contended that, even if the prosecution did not actually possess such documents, it had a duty

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[14] The prosecution produced a copy of that report to the defense during the trial.

under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and the Jencks Act, 18 U.S.C. § 3500, to acquire them. The essence of the defendants' argument was that the prosecution constructively possessed any documents possessed by the Colombian authorities relating to Uribe's extradition because Colombia had cooperated with the United States both by permitting United States officials to interview Uribe and by acting upon the United States' request to extradite him.

On December 14, 2004, during the trial, the District Court held a hearing to consider the defendants' discovery demands. At the hearing, the government took the position that it had no obligation to obtain and turn over the documents sought by the defense. Nevertheless, the prosecutor represented that the United States was attempting to obtain documents from Uribe's attorney in Colombia and that it would turn over whatever it obtained. As earlier noted, the District Court denied the discovery demands. It ruled that the prosecution was not in actual or constructive possession of the documents sought by the defense and was therefore not required under Brady or the Jencks Act to obtain and produce them.[15] The defendants wrongly say that was error.

*281 Brady stands for the proposition that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady, 373 U.S. at 87, 83 S.Ct. 1194. A Brady violation has three components: the evidence at issue

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[15] Despite the District Court's ruling, it appears that the prosecution did obtain some documents from Uribe's attorney and did turn them over to the defense.

must be favorable to the defendant; it must be material; and it must have been suppressed by the prosecution. United States v. Pelullo, 399 F.3d 197, 209 (3d Cir. 2005); United States v. Perdomo, 929 F.2d 967, 970 (3d Cir. 1991). Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). Material evidence can include evidence that may be used to impeach a witness. Id. at 676, 105 S.Ct. 3375; Giglio v. United States, 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

Brady prohibits the prosecution from "supress[ing]" material, favorable evidence, 373 U.S. at 187, 83 S.Ct. 1151, but that does not mean that the prosecution's duty to disclose is limited to evidence within the actual knowledge or possession of the prosecutor. It is well-settled that the prosecution has a duty to learn of and disclose information "known to the others acting on the government's behalf in the case ...." Kyles v. Whitley, 514 U.S. 419, 437, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). Accordingly, it has been held that a state prosecutor has a duty to obtain and turn over to the defense favorable evidence known to a state police officer who investigated the case. Id. at 437-38, 115 S.Ct. 1555. Similarly, a federal prosecutor is charged with knowledge of information possessed by other agents of the federal government when those agents are a part of a "prosecution team," which includes federal personnel involved in the investigation as well as the prosecution of a case. Pelullo, 399 F.3d at 216-18; see also United States v. Antone, 603 F.2d 566, 569 (5th Cir.1979) ("[T]his Court has declined to draw a distinction between different agencies under the same government, focusing instead upon the 'prosecution team' which includes both investigative and prosecutorial personnel.").

In some cases, the government's obligations under Brady may extend even further. We have held that, under certain circumstances, evidence possessed by state agents may be constructively possessed by a federal prosecutor such that the prosecutor has a duty to obtain that evidence and disclose it to the defense. See United States v. Risha, 445 F.3d 298, 303-06 (3d Cir. 2006); see also Antone, 603 F.2d at 569-70. In Risha, we called this issue "cross-jurisdiction constructive knowledge." Risha, 445 F.3d at 299. We considered in that case whether it was proper to impute to a federal prosecutor the knowledge of state agents that a witness who had testified in a federal criminal case expected leniency with respect to unrelated state charges, in return for his cooperation in the federal case. Id. Although the federal prosecutor did not know that the witness expected leniency in state court in return for his testimony, we concluded that the federal prosecutor might, under certain circumstances, be deemed to have constructive knowledge of that information if it was known to the state agents. Id. at 306.

We held that a case-by-case analysis was appropriate when considering a *282 federal prosecutor's constructive knowledge, and we set forth three questions as relevant to the analysis: "(1) whether the party with knowledge of the information is acting on the government's 'behalf' or is under its 'control'; (2) the extent to which state and federal governments are part of a 'team,' are participating in a 'joint investigation' or are sharing resources; and (3) whether the entity charged with constructive possession has 'ready access' to the evidence." Id. at 304. The first question concerns the "intermingling" of the forces of the federal government with the forces of the state

sovereign.[16] Id. The second question is closely related to the first and asks whether the federal government and the state "are part of a team or are engaged in a joint effort" or whether they had a "close working relationship." Id. at 305. The last question considers whether the information the defense alleges should have been disclosed was available to the prosecution if it had sought to discover it. Id. In Risha, we opined that facts indicating that a state agent was heavily involved in the prosecution and knew of impeachment evidence would support a conclusion that federal prosecutors had constructive knowledge of that evidence. Id. at 306.

Our holding in Risha relied, in part, on the opinion of the United States Court of Appeals for the Fifth Circuit in United States v. Antone. In that case, the Fifth Circuit considered whether knowledge of state investigative agents should be imputed to federal prosecutors where there was a joint investigative task force composed of FBI agents and state agents. Antone, 603 F.2d at 568-69. The defendants argued that evidence that a witness's attorney fees had been paid by the state was material because it could have been used to impeach the witness, and they argued further that the state agents' knowledge of that evidence should be imputed to the federal prosecutors for purposes of determining whether the evidence had been suppressed in violation of Brady. Id. at 569-70.

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[16] Implied though not stated in this inquiry into "intermingling" is the idea that the federal government would be the controlling entity in a federal-state partnership. Whether that is a sound assumption in all cases is open to debate. If the Risha test were applicable in the context of cooperation between the United States and a foreign sovereign, a proposition not without doubt (see infra), simply showing an "intermingling" of assets would clearly not be sufficient to show the control assumed in Risha.

The Fifth Circuit agreed that the state agent's knowledge should be imputed to federal prosecutors. The Court first noted that, if the investigators with knowledge of the evidence had worked for a federal agency, their knowledge would have been imputed to the prosecution for Brady purposes. Id. at 569. The Court went on to consider whether evidence in the possession of the state investigators should be treated differently because those investigators represented a different sovereign. Instead of imposing a "rigid distinction" between knowledge possessed by the federal and state agencies, the court endorsed a "case-by-case analysis of the extent of interaction and cooperation between the two governments." Id. at 570. The Fifth Circuit ultimately concluded that the knowledge of the state investigators should be imputed to the federal prosecutors in that case because the federal and state investigative agencies had "cooperated intimately from the outset of [the] investigation" and the degree of cooperation was "extensive." Id. According to the Court, the state investigators essentially "functioned as agents of the federal government under the principles of agency law" and "were in a real sense members of the prosecutorial team." Id.

*283 The situation in the present case is markedly different. First, and most obviously, it involves a foreign sovereign, which implicates issues that may well make a showing of effective federal control of foreign evidence more sensitive and demanding than is suggested by the Risha factors. But even if Risha were the operative test, the defendants do not meet that less demanding standard.[17] The first Risha factor - whether the individ-

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[17] We assume, for purposes of discussion only, that the evidence sought by the defendants was both favorable to the defense and

uals with possession of the requested information were acting on the federal government's "behalf" or were under its "control" - does not support a determination of constructive possession in this case. Risha, 445 F.3d at 304. There is nothing of record to indicate that the nation of Colombia was somehow under American control in the investigation of this case, or that any Colombian authorities were members of a United States "prosecution team." Unlike the state agents in Antone, Colombian authorities did not function as agents of the United States government. It is true that the Colombian government acted at the request of the prosecution in permitting the federal investigators to interview Uribe; however, beyond the initial recitation of the officially propounded questions, no Colombian officials participated in that interview or any other part of the investigation. Moreover, while Colombian officials naturally participated in the Colombian judicial proceeding that resulted in Uribe's extradition, those authorities did not function as agents of the United States government or act under its control. Instead, they acted on behalf of their own government in responding to a request from the United States. The level of cooperation extended by the Colombian government, while admirable, appears to have been nothing more than the comity called for by treaty and custom. We decline to adopt the defendants' suggestion that a determination of constructive possession is appropriate whenever a foreign government responds to a request from the United States for investigative or judicial assistance.

Nor does the second Risha factor support a determination of constructive possession. There was no joint investigation by the United States and Colombian govern-

_____(footnote continued)

material, focusing instead on Brady's requirement that the evidence must have been in the possession of the prosecution.

ments regarding the events alleged in the Indictment. Indeed, there is no indication that the two governments shared any investigative resources whatsoever.[18] *284 See

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[18] The defendants point to a document that, they say, suggests there was a joint investigation. The document is a letter sent by Uribe in July 2004 to a Colombian Magistrate, in which Uribe states that Maria Cristina Muñoz, a Colombian prosecutor, informed him in 2001 that United States Customs agents wanted to interview him. In the letter, Uribe states that he "spontaneously" told Muñoz what he knew about the conspiracy now at issue. (Joint Appendix 456.) The defendants seem to contend that that letter establishes the existence of a joint investigation between the United States and Colombia.

It is questionable whether the defendants' argument with respect to Uribe's July 2004 letter is properly put to us at all since it does not appear to have been presented to the District Court. In any event, the fact that Uribe spoke to a Colombian prosecutor regarding the events alleged in the Indictment does not indicate the existence of a joint investigation. The relevant question, again, is not whether a Colombian official may have learned of evidence relevant to this case, but whether the Colombian government was engaged in a cooperative investigation with the United States government. Uribe's letter does not suggest that it was. No more persuasive is the defendants' contention that a joint investigation is shown by evidence that Carmen Colon, a United States Department of Justice Judicial Attache, contacted Uribe's Colombian attorney regarding the United States' desire to secure Uribe's testimony. The defendants have not explained how evidence of communications between an agent of the United States government and Uribe's attorney demonstrates that there was a joint investigation between the United States and the government of Colombia.

The defendants' briefs also refer to a document that they claim to have recovered after trial from a Colombian court extradition file. That document appears to be a letter sent by Uribe to the

Moon v. Head, 285 F.3d 1301, 1310 (11th Cir. 2002) (refusing to impute to a Georgia state prosecutor evidence possessed by Tennessee law enforcement officials when there was no evidence that Tennessee officials and Georgia prosecutors had participated in a joint investigation).

Finally, the third Risha factor -- whether the federal government had "ready access" to the sought-after information -- does not support a determination of constructive

_____(footnote continued)

Attorney General of Colombia in May 2004 and is strikingly similar to Uribe's July 2004 letter to the Colombian Magistrate. Moreover, the May 2004 letter was never presented to the District Court and is not properly part of the record on appeal. Fed. R.App. P. 10(a).

Despite the lack of evidence indicating a joint investigation, the defendants argue that the District Court should have held an evidentiary hearing regarding their contention that the United States and Colombia undertook such an investigation. However, as just indicated, the defendants did not provide any good cause for a hearing. Put simply, they have failed, both before the District Court and on appeal, to articulate how an evidentiary hearing would have helped them establish that there was a joint investigation. Because they did not make a threshold showing that a material fact was in dispute, their demand for an evidentiary hearing warranted no more consideration than the District Court gave it. Cf. United States v. Panitz, 907 F.2d 1267, 1273 (1st Cir.1990) ("The test for granting an evidentiary hearing in a criminal case [is] substantive: did the defendant make a sufficient threshold showing that material facts were in doubt or dispute?"); Gov't of Virgin Islands v. Martinez, 780 F.2d 302, 306-08 (3d Cir.1986) (holding that an evidentiary hearing regarding an alleged Brady violation was appropriate when an affidavit submitted by the defendant to the district court raised "genuine issues of material fact") (quoting United States v. Dansker, 565 F.2d 1262, 1264 (3d Cir.1977)).

possession. Risha, 445 F.3d at 304. The record suggests that the prosecution did not have access to the documents in Uribe's Colombian court file, aside from those documents it was able to obtain from Uribe's attorney in Colombia. Cf. United States v. Hughes, 211 F.3d 676, 688 (1st Cir.2000) (holding that the prosecution was not required to produce crime scene photographs in the possession of the Mexican government because "the government has no duty to produce evidence outside of its control"); United States v. Friedman, 593 F.2d 109, 120 (9th Cir.1979) (holding that Brady did not require evidence seized by the Chilean government to be produced when the federal government had no access to the evidence). More importantly, though, we could not conclude that the prosecution had constructive possession of the requested documents in this case even if it could have acquired them. The mere fact that documents may be obtainable is insufficient to establish constructive possession. Without a showing that evidence is possessed by people engaged in the investigation or prosecution of the case, we have declined to hold that the evidence was constructively possessed by federal prosecutors, despite its being in the possession of another agent of the federal government and therefore presumably obtainable.[19] See, e.g., Pelullo, 399 F.3d at 218 (holding that information known to officials in the United States Department of Labor was not constructively known to federal prosecutors when there was no indication that the prosecution and the officials *285 engaged in a joint investigation or that the prosecution had any control over the officials); United

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[19] This, of course, assumes that the exculpatory information in question was not known to the prosecutors.

States v. Merlino, 349 F.3d 144, 154 (3d Cir.2003) (holding that there is no "duty on the prosecutor's office to learn of information possessed by other government agencies that have no involvement in the investigation or prosecution at issue") (quoting United States v. Morris, 80 F.3d 1151, 1169 (7th Cir.1996)).

In sum, after examining the factors set forth in Risha, we conclude that the United States was not in constructive possession of evidence, if there were any, possessed by Colombian authorities, and thus there was no violation of Brady in this case.

We also reject the defendants' argument that the prosecution was obligated by the Jencks Act to turn over documents filed by Uribe in Colombia in opposition to his extradition. Jencks requires the prosecution to produce a witness statement "in the possession of the United States which relates to the subject matter as to which the witness has testified." 18 U.S.C. § 3500(b). We have held that the phrase "in the possession of the United States" should be read to "require production only of statements possessed by the prosecutorial arm of the federal government." Merlino, 349 F.3d at 155 (quoting United States v. Dansker, 537 F.2d 40, 61 (3d Cir.1976)); see also United States v. Weaver, 267 F.3d 231, 245 (3d Cir.2001) ("[T]he Jencks Act only applies to evidence in the possession of the United States, and not state authorities...."); Friedman, 593 F.2d at 120 (holding that the Jencks Act did not require the production of evidence that had been seized by the Chilean government). In this case, the documents sought were allegedly located in Uribe's Colombian court file..We reject any general assertion, and certainly any assertion on this record, that Colombian courts serve

as an arm of the United States government.[20] Therefore, we also reject the defendants' argument that the prosecution was required to obtain and turn over those documents under the Jencks Act.[21]

C. Other challenges to the convictions

Jorge and Juan raise a number of other issues related to their convictions, none of which, either alone or in combination, warrant a new trial. First, Juan challenges the District Court's decision to deny his motion for severance. We review under an abuse-of-discretion standard a district court's decision not to sever

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[20] We recognize the existence of authority from the United States Court of Appeals for the Second Circuit that suggests the United States might have a duty under the Jencks Act to attempt to obtain and produce written statements that are in the actual possession of another sovereign when the two governments have engaged in a joint investigation. See United States v. Paternina-Vergara, 749 F.2d 993, 998 (2d Cir.1984) (holding that the most the Jencks Act requires when there is a joint investigation is "a good-faith effort to obtain the statements of prosecution witnesses in the possession of the foreign government" and concluding that the prosecution in that case had made such an effort). We need not address that issue today, however, because, as explained above, there was no joint investigation in this case. Cf. United States v. Durham, 941 F.2d 858, 860-61 (9th Cir.1991) (holding that a federal prosecutor had no obligation under the Jencks Act to provide written statements in the possession of a state agency, noting that federal and state agencies had not undertaken a joint investigation in that case).

[21] The defendants contend that the prosecution committed a number of other Brady violations unrelated to the alleged suppression of evidence in the possession of Colombian authorities. As those additional arguments are vague, conclusory, and, ultimately, unpersuasive, we address them no further.

defendants. *286 Zafiro v. United States, 506 U.S. 534, 538-39, 113 S.Ct. 933, 122 L.Ed.2d 317 (1993). Even if a district court abuses its discretion, however, reversal is not required absent a demonstration of "clear and substantial prejudice resulting in a manifestly unfair trial." United States v. Hart, 273 F.3d 363, 370 (3d Cir.2001) (internal quotation marks omitted).

Federal Rule of Criminal Procedure 8(b) states that defendants may be charged together in an indictment "if they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses." Fed.R.Crim.P. 8(b). It further provides that "[a]ll defendants need not be charged in each count." Id. Rule 14(a), in turn, permits a court to sever defendants' trials if the joinder of defendants in an indictment "appears to prejudice a defendant." Fed.R.Crim.P. 14(a). "[W]hen defendants properly have been joined under Rule 8(b), a district court should grant a severance under Rule 14 only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." Zafiro, 506 U.S. at 539, 113 S.Ct. 933.

Juan does not contend that he and Jorge were improperly charged together in the Indictment. Instead, he appears to argue that the District Court abused its discretion in declining to sever his trial from Jorge's because evidence of the separate conspiracy alleged in Counts 1 through 4, counts which name only Jorge as a defendant, had the potential to lead a jury to conclude Juan was involved in that conspiracy and thus to unfairly lead the jury to find Juan guilty on Counts 5 and 6.[22]

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[22] Portions of Juan's brief appear to suggest that the District

Juan further argues that the joint trial subjected him to actual prejudice, not only because the jury heard evidence that was only relevant to Counts 1 through 4, but also because the prosecutor confused Jorge's and Juan's names on multiple occasions.

In denying Juan's motion to sever, the District Court concluded that any potential prejudice to Juan resulting from the joint trial could be cured by limiting instructions, which the District Court gave. We agree. The risk of unfair prejudice in this case was not such that the District Court was bound to grant Juan's motion to sever. Cf. Zafiro, 506 U.S. at 540, 113 S.Ct. 933 ("[E]ven if there were some risk of prejudice, here it is of the type that can be cured with proper instructions, and 'juries are presumed to follow their instructions.' ") (quoting Richardson v. Marsh, 481 U.S. 200, 211, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987)).

However, even if we agreed with Juan that the District Court abused its discretion in denying his motion to sever, he has failed to demonstrate "clear and substantial prejudice resulting in a manifestly unfair trial." Hart, 273 F.3d at 370 (internal quotation marks omitted). There is no reason to believe that the jury failed to understand the District Court's instructions regarding how to use the evidence offered against Jorge on Counts 1 through 4. Moreover, although "evidence of a codefendant's wrongdoing in some circumstances erroneously could lead a jury

(footnote continued)

Court should have granted his motion for severance not because the joint trial created a risk of prejudice but because of what actually developed during trial. But, of course, the question of whether the District Court abused its discretion in denying his motion for severance should be judged as of the time the motion was ruled on.

to conclude that a defendant was guilty," Zafiro, 506 U.S. at 539, 113 S.Ct. 933, Juan's assertion that the jury so erred in this case *287 has no force, given the jury's acquittal of Jorge on Counts 1 through 4. Finally, although it appears that the prosecutor mixed up Jorge's and Juan's names on more than one occasion, the trial transcript indicates that, on each occasion, the prosecutor either corrected himself or was corrected by the Court. After examining the record, we are unpersuaded that Juan suffered any prejudice, let alone clear and substantial prejudice, by being tried with his brother, and we therefore reject his challenge to the District Court's denial of his motion to sever.

Next, the defendants allege that many of the District Court's evidentiary rulings constituted abuses of discretion. These complaints truly warrant little comment. Suffice it to say that, having examined the record, we see no abuse of discretion in the experienced District Judge's even-handed rulings on evidentiary questions.[23] We also reject Juan's assertion that the District Court abused its discretion in failing to grant a mistrial after Lagrotteria

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[23] The defendants' argument that the District Court improperly admitted testimony regarding a phone conversation between Juan and Lagrotteria lacks merit because the record reflects that the Court struck that testimony and instructed the jury not to consider it. For the same reason, there is nothing to the defendants' argument that the District Court erroneously admitted testimony from Uribe that the jury might have understood to refer to prior drug deals by the defendants. Finally, we cannot conclude that District Court abused its discretion in admitting Lagrotteria's testimony regarding the amount of profit his co-conspirators told him he could expect to receive for his participation in the conspiracy.

testified regarding an unrecorded phone conversation he had with Juan, during which Juan was "clowning around" and told Lagrotteria that Juan had a gun to Uribe's head. (SA 594.) The District Court immediately struck that portion of Lagrotteria's testimony and instructed the jury to disregard it. Assuming, without deciding, that the challenged testimony was inadmissible, we believe that the Court's instruction was more than sufficient to cure any unfair prejudice.

In addition, we reject the defendants' argument that the District Court abused its discretion in failing to grant a mistrial as a result of alleged prosecutorial misconduct during closing arguments. Again, we are unpersuaded that the challenged comments, assuming they were improper, affected the jury's ability to judge the evidence fairly.

Finally, we decline the invitation to aggregate these alleged errors and then conclude the defendants were deprived of a fair trial. Even when all of the defendants' complaints are combined, the District Court's handing of this highly contentious case was admirable, not error-ridden.

D. Sentencing

We turn last to Juan's challenge to his sentence. He argues that he should be re-sentenced because, prior to his sentencing, the District Judge spoke with Uribe off the record. The record in this regard is less than clear but it does appear that the District Judge did speak with Uribe before sentencing and that their discussion was outside of the presence of the parties and was not transcribed. We are nevertheless compelled to conclude that Juan waived any objection he might otherwise have had regarding that discussion.

Prior to sentencing, the defendants moved for downward departures under the advisory Guidelines. The

government opposed the motions and offered to put Uribe on the stand at the sentencing hearing to provide a factual rebuttal to the defendants' contentions. The government requested,*288 however, that the District Court limit the defendants' cross-examination regarding the identity of one of Uribe's cocaine suppliers because Uribe believed he would be in mortal danger if he openly named the supplier. The defendants objected to any limitation being placed upon Uribe's cross-examination, but Juan's counsel expressly affirmed he had no objection to the sensitive portion of Uribe's testimony being taken "in camera."[24] (SA 3816.)

On the morning of the sentencing hearing, counsel for both sides spoke with the District Judge in chambers prior to the hearing. That conference was not placed on the record. Later, at the beginning of the sentencing hearing, the District Judge noted that the defendants had agreed during the off-the-record conference to withdraw their motions for downward departures and that, as a result, the government was no longer seeking to introduce Uribe's testimony at the sentencing hearing. The government still offered to have Uribe testify, if the District Judge believed such testimony would be relevant in determining the appropriate sentences to impose. The Judge indicated, however, that he did not need to hear from Uribe, that Uribe's testimony would only have been relevant to the defense motions for downward departure, which had been withdrawn. The Court proceeded to sentencing without further discussion on that point.

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[24] It's unclear what the parties understood "in camera" to mean. Statements by the prosecution indicate that it contemplated the defendants being present during the portion of Uribe's cross-examination that was to be taken in camera.

After the Court had imposed sentence, counsel for Juan stated, "I forgot earlier after the ex parte meeting with Mr. Uribe to register my objection." (SA 3713.) The following exchange then took place, in which the District Court understandably displayed its consternation:

> THE COURT: That's very fine, but I don't recall that ever being indicated to me before I engaged in this exercise. I didn't hear any objection from anybody.
>
> ...
>
> What are you saying to me?
>
> [JUAN'S COUNSEL]: That we did not have an opportunity on the record to object to the ex parte proceeding.
>
> THE COURT: Where have you been? I came out here a number of times before I began the sentencing and I never heard anything about this. In fact, I kept Uribe here in the event there would be a problem about my decision or your decision to not proceed with the motion to depart.
>
> [JORGE'S COUNSEL]: Your Honor advised us, me and advised [another of Juan's counsel] and myself and [Juan's counsel] had an opportunity to object had we so determined. So I absent myself from --
>
> THE COURT: I appreciate that. I try to bend over backwards to make this a fair proceeding. I really do.
>
> [JORGE'S COUNSEL]: No question about that.
>
> . . .
>
> THE COURT: ... You [Juan's counsel] made the objection for the record. Let me make something for the record.

> You know, every time I do this I regret it. It's only happened to me one time before ....
>
> Every time, at counsel[']s request, Judge can we see you in chambers before you come out? I thought to myself well, you know, these are respected attorneys. I rely on what they say. I don't have any problem discussing preliminarily something that's of concern to *289 them. So, I didn't have a Court Reporter in there which reflects my trust in counsel. And then to come out here now and have defense counsel tell me that they object to my ex parte proceeding. In fact --
>
> [JORGE'S COUNSEL]: Not me.
>
> THE COURT: I recognize it's [Juan's counsel].
>
> In fact, in chambers off the record I think I originally said government counsel will conduct the [sic] examinaiton. Then I said to myself well, that doesn't make any sense. Why should I have government counsel in here with defense counsel in here. So, I'll talk to the witness, Mr. Uribe, myself with no counsel present. I never heard a single objection about that....

(SA 3713-15.)

On appeal, Juan alleges that the District Judge may have improperly relied on information he obtained by Uribe during their private discussion in deciding upon the sentence to impose. He requests that we vacate Juan's sentence and remand for re-sentencing before a different judge. Although the precise basis for his assertion of error is not entirely clear, he appears to contend that the conversation between Uribe and the District Judge

violated his right to due process because any comment Uribe might have made was untested and unreliable.

After examining the transcript of the sentencing proceeding, we conclude that Juan waived whatever argument he might have had because he agreed to have the District Court speak with Uribe off the record and alone prior to the sentencing hearing.[25] The transcript indicates that the Court explicitly gave all counsel, including counsel for both Jorge and Juan, an opportunity to structure how certain information relevant to the defendants' downward departure motions would be received from Uribe. Counsel not only failed to object, they played a direct role in developing how the discussion with Uribe would take place. Under those circumstances, the Judge understood - and it was entirely reasonable for him to understand - that Juan, through his counsel, had agreed to the Judge speaking with Uribe privately prior to the sentencing hearing. Cf. United States v. Mitchell, 85 F.3d 800, 807-09 (1st Cir.1996) (counsel's lack of objection coupled with behavior suggesting assent constituted a waiver). We share the District Court's distress at gamesmanship so blatant that even counsel for Juan's brother distanced himself from it, and we hold that Juan's late objection was waived.[26]

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[25] We note, however, that there is no indication from the transcript of the sentencing proceeding that, when deciding upon the sentences to impose, the District Judge relied in any way upon information he might have received from Uribe during their private discussion.

[26] We emphasize, though, that district courts should avoid off-the-record discussions with either counsel or witnesses. As this case demonstrates, such a procedure may tempt a disappointed party to adopt dubious tactics to overturn a decision. Although counsel's "I forgot to object" ploy is devoid of merit, it provides a

III. Conclusion

For the reasons set forth above, we will affirm the District Court's judgments of conviction and sentence.

C.A.3 (N.J.), 2008.
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_____(footnote continued)

cautionary tale.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA,
Plaintiff,
v.
JORGE REYEROS and JUAN REYEROS,
Defendants.

Crim. No. 00-822 (WGB)

MEMORANDUM OPINION

APPEARANCES:

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BASSLER, SENIOR DISTRICT JUDGE:

On January 7, 2005, a jury found defendants Jorge Reyeros and Juan Reyeros guilty of Counts Five and Six of a six-count indictment. The second superceding indictment ("Indictment") charged Jorge Reyeros with two counts of conspiracy to import cocaine, in violation of 21 U.S.C. § 963: Count One alleged a 1997 conspiracy to import 248 kilograms of cocaine; Count Five alleged a 1999 conspiracy to import 400-500 kilograms of cocaine. The Indictment also charged Jorge Reyeros with four counts (Counts Two, Three, Four, and Six) of exceeding authorized access to a United States Customs Service computer, in violation of 18 U.S.C. §§ 1030(a)(2)(B)&(c)(2)(B) and 2. Juan Reyeros was charged with one count of conspiracy to import cocaine (Count Five) and one count of aiding and abetting the unauthorized access of a United States Customs Service ("Customs") computer (Count Six).

Defendants Jorge Reyeros and Juan Reyeros now move this Court for a judgment of acquittal pursuant to Fed. R. Crim. P. 29(c) or a new trial pursuant to Fed. R. Crim. P. 33. The defendants submit four arguments in support of their motions: (1) the admission of testimony by Krishna Katwaroo was prejudicial; (2) the Court erred in admitting Jorge Reyeros's computer access of two companies as evidence of "other crimes"; (3) there was insufficient evidence to sustain the convictions of the defendants on Counts Five and Six; and (4) the prosecution's statements during rebuttal summation infected the trial with fatal error.

For the reasons set forth below, the Court **denies** the motions of Jorge Reyeros and Juan Reyeros.

DISCUSSION

I. Rule 29 Motion

A defendant may move for entry of a judgment of acquittal if "the evidence is insufficient to sustain a conviction." Fed. R.Crim. P. 29(a). Only the defendants' third argumentthat there was insufficient evidence to sustain the convictions of the defendants on Counts Five and Sixis grounds for a Rule 29 motion for entry of a judgment of acquittal.

In reviewing the sufficiency of the evidence supporting a jury's guilty verdict, the Court must view the evidence "in the light most favorable to the government and must sustain a jury's verdict if a reasonable jury believing the government's evidence could find beyond a reasonable doubt that the government proved all the elements of the offenses." United States v. Tyler, 281 F.3d 84, 99 (3d Cir. 2002) (quoting United States v. Rosario, 118 F.3d 160, 163 (3d Cir. 1997)) (internal quotation marks omitted).

A. Sufficiency of Evidence Against Juan Reyeros

Juan Reyeros argues that there was insufficient evidence to support his conviction on Counts Five and Six because the Government's main witnessesco-defendant Hernan Uribe and coconspirator James Lagroterria—were not credible. Juan Reyeros asserts that "[t]he only 'credible' evidence offered by the Government was a tape containing Juan Reyeros [sic] voice uttering the cryptic phrase 'try to order three.'" (Juan Reyeros's Br. at 6.) Juan Reyeros's argument ignores the standard set by Rule 29. The Court must presume that the jury properly evaluated the credibility of witnesses, properly found the facts, and drew justifiable inferences from the evidence. United States v. Menon, 24

F.3d 550, 564 (3d Cir. 1994); United States v. Coleman, 811 F.2d 804, 807 (3d Cir. 1987). It is not the job of this Court to weigh the evidence or make determinations regarding credibility. United States v. Giampa, 758 F.2d 928, 934-935 (3d Cir. 1985). Therefore, Juan Reyeros's argument that Uribe and Lagroterria were not credible witnesses is unpersuasive: the Court must assume that the jury found Uribe and Lagroterria to be credible. The Court finds that the Government presented sufficient evidence to "establish a case from which the jury can find the defendant guilty beyond a reasonable doubt." United States v. Leon, 739 F.2d 885, 891 (3d Cir. 1984) (citing United States v. Allard, 240 F.2d 840, 841 (3d Cir. 1957)) (internal quotation marks omitted).

1. Count Five: 1999 Conspiracy

Count Five of the Indictment charges Juan Reyeros with participating in a 1999 conspiracy to import approximately 400-500 kilograms of cocaine into the United States from Ecuador. "One element the government must show in a conspiracy case is that the alleged conspirators shared a 'unity of purpose', the intent to achieve a common goal, and an agreement to work together toward the goal." United States v. Idowu, 157 F.3d 265, 268 (internal citations and quotation marks omitted). "In order for us to sustain a defendant's conviction for conspiracy, the government must have put forth evidence tending to prove that defendant entered into an agreement and knew that the agreement had the

specific unlawful purpose charged in the indictment." Id. (internal citations and quotation marks omitted).

The Government presented two witnesses that testified to Juan Reyeros's involvement in the 1999 conspiracy. James Lagroterria testified that in April 1999 he met with Juan Reyeros and Hernan Uribe in Medellin, Colombia, to discuss the importation of cocaine into the United States. (See Trial Tr. 10/26/04 at 148-53.) Lagroterria testified that he, Juan Reyeros, and the other co-conspirators had "enter[ed] into a business deal together," whereby Juan Reyeros was to use his contacts with a Customs official "to make sure everything went smoothly." (Id. at 152.) Lagroterria also identified the voice of Juan Reyeros on a recorded conversation, in which Lagroterria, Uribe, and Juan Reyeros agreed to ship three containers of cocaine into the United States through a fictitious company called TJ Import Produce. (See Trial Tr. 10/29/04 at 12-18.)

Hernan Uribe also confirmed the presence of Juan Reyeros at a meeting in Medellin, Colombia, in which the persons involved discussed the importation of cocaine into the United States. (See Trial Tr. 12/16/04 at 39-40.) Uribe testified that Juan Reyeros's role in the conspiracy was to contact his brother in the United States Customs Service and ask that his brother allow containers filled with drugs to pass through Customs. (See id. at 43.)

The evidence at trial also included taped conversations in which Juan Reyeros discussed the importation of bananas into the United States using

a company called TJ Import Produce. (See Gov't Ex. 100.) Lagroterria and Uribe confirmed that the coconspirators intended to ship cocaine along with the bananas. See Trial Tr. 10/28/04 at 9; Trial Tr. 12/16/04 at 43.)

The testimony of Lagroterria and Uribe, along with the voice of Juan Reyeros on the tapes, is sufficient evidence for a reasonable jury to find Juan Reyeros guilty of the 1999 conspiracy beyond a reasonable doubt. The testimony and the tapes indicate that Juan Reyeros was aware of an agreement to import cocaine into the United States, that he joined in that agreement, and that he actively participated in achieving the agreement's purpose. A reasonable jury could therefore find Juan Reyeros guilty of conspiring to import cocaine into the United States.

2. Count Six: Aiding and Abetting Unauthorized Access

Count Six of the Indictment charges Juan Reyeros with aiding and abetting Jorge Reyeros's access of a United States Customs Service computer in excess of his authority, in violation of 18 U.S.C. §§ 1030(a)(2)(B),(b)&(c)(2)(B) and 2. An individual violates Section 1030(a)(2)(B) when he "intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains information from any department or agency of the United States."

Michael Grimaldi testified that on April 12, 1999, an individual using Jorge Reyeros's "user ID"

logged on to the ACS computer database from the computer terminal E4GT located in Jorge Reyeros's office. (Trial Tr. 11/17/04 at 90-93.) Grimaldi further testified that the individual used terminal E4GT to access the entry history of a fictitious company called TJ Import Produce. (Id. at 130-40.) A reasonable jury could have concluded beyond a reasonable doubt that Jorge Reyeros was the individual that accessed the entry history of TJ Import Produce.

Lagroterria testified that he faxed a document to Rafael Garavito containing the name TJ Import Produce. (Trial Tr. 10/28/04 at 83.) Lagroterria stated that Juan Reyeros then confirmed that his contact in Customs checked on TJ Import Produce and "pre-qualified" the company, meaning that the conspirators would use TJ Import Produce to ship drugs into the United States (Id. at 83-84.) Lagroterria also testified to conversations that he recorded with Uribe. (See id. at 98-116; Gov't Ex. 100.) Lagroterria testified that during a conversation on June 9, 1999, Uribe confirmed that Juan Reyeros had checked out and approved TJ Import Produce for use in the 1999 conspiracy. (Trial Tr. 10/28/04 at 104.) Lagroterria testified that during subsequent conversations, Uribe confirmed that Reyeros would have his contact in Customs research other companies. (See id. at 108, 113; Gov't Ex. 100.) A reasonable jury could conclude from the taped conversations and from Lagroterria's testimony that Juan Reyeros was contacting his brother, Jorge Reyeros, in Customs and asking him to use his position to access information on import

companies. Drawing this inference, a reasonable jury could conclude that Juan Reyeros aided and abetted Jorge Reyeros in exceeding his authorized access to his United States Customs Service computer.

A. Sufficiency of Evidence Against Jorge Reyeros

Jorge Reyeros also claims that there was insufficient evidence to sustain his convictions on Counts Five and Six Indictment.

1. Count Five: 1999 Conspiracy

With regards to the 1999 conspiracy, the testimony of Lagroterria and Uribe applies equally to Jorge Reyeros. Lagroterria testified that Juan Reyeros knew a Customs official that could help clear shipments into the United States without inspection. (See Trial Tr. 10/28/04 at 149, 152-53.) Lagroterria also testified to conversations with Uribe. During those conversations, Uribe confirmed that Juan Reyeros's contact in Customs researched companies for their suitability for the importation of cocaine into the United States. (See Trial Tr. 10/28/04 at 93, 104, 108; Trial Tr. 10/29/04 at 42; Gov't Ex. 100.) It is undisputed that in 1999 Jorge Reyeros worked for the United States Customs Service in Newark, New Jersey.

In addition, Uribe corroborated Lagroterria's testimony that Jorge Reyeros was researching companies for his co-conspirators:

> Mr. Ray Brown: When you say Jorge use his Customs position, what are you making reference to?

> Hernan Uribe: Juan always told me part of the job, Juan's job, what was to assure that the drugs came in through his brother which is to be a Customs agent.
> Q: What was his brother's name, sir?
> A: Jorge Reyeros.
> Q: Did Juan ever tell you how that worked?
> A: Yes.
> Q: What did he tell you, sire [sic]?
> A: We need to either find a company or he could find a company through the list . . .

(See Trial Tr. 12/17/04 at 40-41.) More importantly, Uribe confirmed that Jorge Reyeros's role in the conspiracy was to "let the drugs go by." (Id. at 43.)

This testimony was bolstered by that of Grimaldi, who testified that an individual, using the "user ID" of Jorge Reyeros, accessed the ACS database to research TJ Import Produce. (Trial Tr. 11/17/04 at 90-99, 130-40.)

Weighing the testimony of Lagroterria and Uribe, a reasonable jury could conclude that Jorge Reyeros participated in the 1999 conspiracy to import cocaine into the United States.

2. Count Six: Exceeding Authorized Access

Count Six of the Indictment charges Jorge Reyeros with accessing a United States Customs Service computer in excess of his authority, in violation of 18 U.S.C. §§ 1030(a)(2)(B),(b)& (c)(2)(B) and 2. In light of the analysis above, the Court finds

sufficient evidence existed for the jury to find Jorge Reyeros guilty of exceeding his authorized access to a government computer. For the foregoing reasons, the Court denies the Rule 29 motions of Jorge Reyeros and Juan Reyeros.

II. Rule 33 Motion

Pursuant to Rule 33, the trial court may, in the interest of justice, vacate the judgment and grant a new trial. "A district court can order a new trial on the ground that the jury's verdict is contrary to the weight of the evidence only if it believes that there is a serious danger that a miscarriage of justice has occurredthat is, that an innocent person has been convicted." United States v. Brennan, 326 F.3d 176, 189 (3d Cir.), cert. denied 124 S. Ct. 248 (2003) (internal quotation marks and citations omitted). "Thus, 'motions for a new trial based on the weight of the evidence are not favored.'" Id. (quoting Virgin Islands v. Derricks, 810 F.2d 50, 55 (3d Cir. 1987). In determining whether an innocent person has been convicted, a district court "does not view the evidence favorably to the Government, but instead exercises its own judgment in assessing the Government's case." Id.

A. Admission of Katwaroo's Testimony

Both defendants move for a new trial on the grounds that the Court erred in admitting the co-conspirator statements of Oscar Roldan. The Government elicited these statements, testified to by Krishna Katwaroo, to prove the 1997 conspiracy

alleged in Count One against Jorge Reyeros. The defendants argue that the admission of Katwaroo's testimony "functioned to deny [the defendants] a fair trial, notwithstanding the acquittals on Counts One, Two, Three, and Four." (Jorge Reyeros's Br. at 5; see also Juan Reyeros's Br. at 1.)

The Court denies the defendants' Rule 33 motions on this ground. The Court carefully evaluated the admissibility of Oscar Roldan's statements to Krishna Katwaroo in its December 3, 2004 opinion on the record. The Court sees no reason to revisit the issues considered in that opinion.

Furthermore, the jury found Jorge Reyeros not guilty of Counts One, Two, Three, and Four--all of the counts to which Katwaroo's testimony applied. This acquittal demonstrates the jury's ability to weigh and to use the evidence properly.

In addition to adopting Jorge Reyeros's argument, Juan Reyeros contends that the admission of Katwaroo's testimony was prejudicial because of its "spillover" effect. The Court also addressed this claim in its opinion of December 3, 2004. Moreover, the Court informed the jury that Katwaroo's testimony was not offered against Juan Reyeros on Counts Five and Six of the Indictment, but only against Jorge Reyeros on Counts One through Four. There is no reason to believe that the jury could not follow the Court's instructions limiting the use of this evidence to Jorge Reyeros. In fact, because the jury acquitted Jorge Reyeros of Counts One through Four, there is no reason to believe that the jury used this evidence at all to reach a guilty verdict.

Nonetheless, Juan Reyeros notes that Assistant United States Attorney Richard Brown confused the names of the defendants on four separate occasions during his summation and rebuttal summation. Juan Reyeros asserts that "[t]he existence of this confusion in the mind of a skilled advocate conversant with every nuance of this case demonstrates conclusively that uncertainty must have existed in the minds of untrained jurors far less intimate with the facts of the case." (Jorge Reyeros's Br. at 2-3.) The Court disagrees.

First, simply because AUSA Brown transposed the names of the defendants does not mean that the jury did: the jury consisted of twelve minds, not one. There is no evidence that the jury was confused. During four days of deliberation, the jury submitted four communications to the Court, and not one asked for clarification as to the defendants' names.

Second, each of AUSA Brown's errors was followed by a limiting instruction from the Court. Furthermore, AUSA Brown apologized to the jury after each of his mistakes.

Third, despite the similarity of the defendants' names, the roles of the defendants were quite different. Jorge Reyeros was a United States Customs Service official, acted from his post in Newark, and did not require an interpreter. Juan Reyeros, on the other hand, was not a Customs official, acted from Colombia, and required an interpreter at trial. In addition, Jorge Reyeros was indicted on all six counts, whereas Juan Reyeros was indicted on only Counts Five and Six.

In light of these considerations, the Court concludes that there was no "spillover" effect with regard to the admission of Katwaroo's testimony or with regard to the confusion of the defendants' names by AUSA Brown. Therefore, the Court denies the defendants' Rule 33 motions on this ground.

B. Admission of "Other Crimes" Evidence

Pursuant to Fed. R. Evid. 404(b), the Court admitted evidence of "other crimes" against Jorge Reyeros. The evidence consisted of computer accesses of two companies, Myra International and Comeco. The Court issued a limiting instruction directing the jury to consider this evidence only against Jorge Reyeros and not Juan Reyeros.

Jorge Reyeros moves for a new trial on the ground that there was "no evidence that the accesses were connected to any criminal activity and/or conspiracy." (Jorge Reyeros's Br. at 12.) Juan Reyeros moves for a new trial on the same ground as Jorge Reyeros, as well as on the ground that "spill-over" was inevitable.

On December 14, 2004, the Court issued an opinion on the record addressing these issues. For the reasons stated on the record that day, as well as for the reasons set forth above in relation to the admission of Katwaroo's testimony, the Court denies the defendants' Rule 33 motions on this ground.

C. Prosecution's Statements During Rebuttal Summation

During his rebuttal summation, AUSA Brown made the following statement:

> There has also been much argument about the character of witnesses. That we presented to you witnesses with long criminal histories, bad guys . . . We didn't pick those witnesses. . . . [I]f the government could we would bring in Mother Theresa, we would bring in the Pope, we would bring in the shaman, bring in rabbis, any one of the higher people to testify, but we can't do that because those people don't know what they did. . . . Those people don't hang with them."

(Trial Tr. 1/4/05 at 103-04.) Jorge Reyeros and Juan Reyeros argue that this statement constituted an attack on their character that infected the trial with fatal error.

"Prosecutorial misconduct merits a new trial when it materially affects the outcome." U.S. v. Coleman, 862 F.2d 455, 457 n.2 (3d Cir. 1988) (citing Smith v. Phillips, 455 U.S. 209, 219 & n. 10 (1982)). The comments of the prosecutor must have been so prejudicial as to violate the defendants' due process rights. United States v. Adams, 759 F.2d 1099, 1111 (3d Cir. 1985).

The comments made by the prosecutor in this case did not materially affect the outcome of this trial. In United States v. Barbone, 283 F.2d 628, 632 (3d. Cir. 1960), the prosecutor made "a reference to the defendants that they were not Sunday School people." The Third Circuit Court of Appeals held that this comment was not highly prejudicial. The

statement "was not a part of a persistent and calculated attack on the character of the defendants," and "[i]t was, if anything, far more kind to the defendants than their own actions as described on the witness stand." Id. That is the case here. AUSA Brown made a single misguided statement, not a repetitive attack on the character of the defendants.

Moreover, defense counsel objected to the comments, and the Court addressed the objection at a sidebar conference. At the close of the prosecutor's rebuttal summation, the Court instructed the jury that the lawyers' closing arguments were not evidence and that the jury's memory controlled as to the evidence. This Court thus neutralized the prejudicial effect of AUSA Brown's statement with its instructions to the jury. See United States v. Somers, 496 F.2d 723, 738 (3d Cir. 1974) ("whatever prejudicial effect there may have been was neutralized" by the curative instructions of the district court).

Because the prosecutor's statement was not highly prejudicial, the Court denies the defendants' Rule 33 motions on this ground.

D. Sufficiency of the Evidence

Both defendants move for a new trial on the grounds that there was insufficient evidence to convict them on Counts Five and Six. Although the Court has already reviewed the sufficiency of the evidence in the guise of a Rule 29 motion, the Court must also review the evidence under the standards of a Rule 33 motion.

Despite the defendants' contentions, the weight of the evidence in this case falls in the Government's favor. The Government offered two witnesses against Juan Reyeros--James Lagroterria and Hernan Uribe. Uribe corroborated the testimony of Lagroterria that Juan Reyeros's role in the conspiracy was to use his brother in Customs to facilitate the shipment of cocaine into the United States. Furthermore, the Government presented taped conversations, some of which Juan Reyeros was a part, that outlined the details of the conspiracy. Lagroterria, Uribe, and the tapes confirmed that the conspirators intended to use TJ Import Produce, a fictitious company, to import the cocaine.

The testimony of Lagroterria and Uribe also implicated Jorge Reyeros's involvement in the conspiracy. In addition, the Government offered the testimony of Michael Grimaldi against Jorge Reyeros. Grimaldi demonstrated how and when Jorge Reyeros accessed the entry history of TJ Import Produce from the computer terminal located in his office with Customs.

The defendants argue that Lagroterria and Uribe were not credible witnesses. The Court disagrees. Lagroterria and Uribe gave lengthy accounts of the conspiracy and its members. Their stories were corroborated by one another and by the taped conversations. Based upon their testimony, there is no reason to believe that "an innocent person has been convicted." United States v. Brennan, 326 F.3d 176, 189 (3d Cir.), cert. denied 124 S. Ct. 248

(2003) (internal quotation marks and citations omitted). Therefore, the Court denies the defendants' motion for a new trial on the ground that the evidence is insufficient to support a conviction.

CONCLUSION

For the foregoing reasons, the Court **denies** the motions of Jorge Reyeros and Juan Reyeros for a judgment of acquittal and for a new trial. An appropriate order follows.

Dated: March 30, 2005

/s/ William G. Bassler
WILLIAM G. BASSLER, U.S.S.D.J.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 06-1485
UNITED STATES OF AMERICA
v.
JORGE REYEROS, Appellant
(N.J. (Newark) D.C. Criminal No. 00-cr-00822-1)

No. 06-1486
UNITED STATES OF AMERICA
v.
JUAN REYEROS, Appellant
(N.J. (Newark) D.C. Criminal No. 00-cr-00822-2)

SUR PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING *EN BANC*

Present: SCIRICA, *Chief Judge*, SLOVITER, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, and ALARCON,* *Circuit Judges*

The petition for rehearing filed by appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in

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* Honorable Arthur L. Alarcon, Senior Judge, United States Court of Appeals for the Ninth Circuit, sitting by designation, limited to panel rehearing only.

regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT:

/s/ Kent A. Jordan
Circuit Judge

Dated: 10 October 2008